

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Reexamination of the Comparative)
Standards for New Noncommercial)
Educational Applicants)

MM Docket No. 95-31

To: The Commission

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**COMMENTS OF THE NATIONAL FEDERATION
OF COMMUNITY BROADCASTERS**

The National Federation of Community Broadcasters ("NFCB") respectfully submits these comments in response to the *Notice of Proposed Rulemaking*, FCC No. 95-79 (Released March 17, 1995) ("*NOPR*") in the above-referenced matter. NFCB generally agrees with the broad principles outlined in the comments that are being submitted today by the Association of America's Public Television Stations and National Public Radio ("APTS/NPR"). However, as discussed below, NFCB does have significant differences as to several of the specific comparative elements that APTS/NPR have advocated as critical to choosing between applicants for new noncommercial educational licenses.

I. AREAS OF AGREEMENT

There are several matters that are clearly not in dispute. First, as the Commission has already recognized, there is broad consensus that the Commission should reject time sharing and auxiliary power in evaluating noncommercial applicants. *NOPR* at ¶7. Second, NFCB also agrees with APTS/NPR that the Commission should adopt procedures for summary disposition of noncommercial applications unless an applicant demonstrates that it must cross-examine witnesses to have a fair opportunity to present its case. See APTS/NPR Comments at 20-21.

Moreover, NFCB strongly advocates mandating a holding period equal to a license term,

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or seven years, whichever is longer, for successful applicants.¹ Establishment of a holding period addresses the D.C. Circuit's concern in *Bechtel v. FCC*, 10 F.3d 875 (1993), that license holders will remain true to their comparative promises. It also ensures that licensees with long-term commitments to their communities are chosen, resulting in service that is more likely to meet community needs.²

Finally, NFCB has reconsidered its prior support of a point system, and now believes that such a system would not adequately determine the best qualified applicant. As APTS/NPR point out in their comments, while a point system may more easily quantify comparative criteria, case-by-case consideration of each of the applicable criteria will more likely result in choosing the applicant that will best serve the public interest.

II. AREAS IN DISPUTE

As mentioned previously, NFCB agrees, in principle, with the comparative criteria and relevant factors that APTS/NPR have set out in pp. 2-3 of their comments. As the Commission has already noted, NFCB believes that the Commission's current criteria for awarding noncommercial licenses are inadequate. The new criteria proposed here will more accurately determine which applicant will best serve the community of license.

However, NFCB disagrees with several of the specific elements that APTS/NPR suggest for use in evaluating these criteria. First, unlike APTS/NPR, NFCB believes that the Commission should value diversity of ownership over broadcast experience and multiple ownership.

¹APTS/NPR suggest a holding period of five years. APTS/NPR Comments at 21.

²While waivers should, of course, be available for good cause shown, the Commission should be clear that the holding requirement will not be routinely waived.

Second, NFCB believes that the Commission should not consider weighing any one factor more or less than any other in making a comparative determination. The Commission's approach should be more holistic, treating programming, structure and other factors equally.

A. Diversity of Ownership

As NFCB has stated previously in this docket, the Commission, should, by its comparative system, promote diversity of ownership of noncommercial stations. See NFCB Comments filed June 2, 1992. To do otherwise would deny the public its right to "the widest possible dissemination of information from diverse and antagonistic sources." *Turner Broadcasting v. FCC*, 114 S.Ct. 2470 (1994) quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Reflecting the fact that their membership includes existing licensees and networks, APTS/NPR urge the Commission to give additional weight to prior broadcast ownership and experience. In evaluating whether an applicant's governing board reflects the community of license, APTS/NPR ask the Commission to "give credit to state agencies and entities which are created to provide educational and public broadcast programming to the state." APTS/NPR Comments at 9. They also ask that the Commission consider "whether the applicant has a past record of providing broadcast service" when evaluating whether an applicant has demonstrated that it has a reasonable prospect of effectuating its proposal. APTS/NPR Comments at 13. Finally, while stating that diverse programming is an important element to determining the best comparative applicant, APTS/NPR assert that "giv[ing] credit to applicants without other interests in the mass communications media...is...inappropriate in the noncommercial educational context..." APTS/NPR Comments at 14 citing *Real Life Educational Foundation of Baton Rouge, Inc.*, 6 FCCRcd 259 (1991) ("*Real Life*").

While NFCB agrees that provision of diverse programming to the community is an important comparative factor, it believes that such diversity is best achieved with diverse ownership. *See Metro Broadcasting v. FCC*, 110 S.Ct 2997, 3012 (1990) ("From its inception, public regulation of broadcasting has been premised on the assumption that diversification of ownership will broaden the range of programming available to the broadcast audience.") To the extent that *Real Life* stands for the proposition that comparative credit should not be given to noncommercial applicants without other media interests, NFCB asks the Commission to overrule this decision and find that diversification of ownership of noncommercial stations should, indeed, be considered in awarding noncommercial licenses.³

In any event, however, *Real Life* most decidedly does *not* stand for the proposition that comparative credit should be given to applicants *with* other media interests. At best, *Real Life* holds that ownership of other media interests is *irrelevant*, and at the very least, does not support APTS/NPR's suggestion that the Commission should give credit to noncommercial applicants with other media holdings.⁴

³In the *NOPR*, the Commission recognizes that diversification of ownership is not currently taken into account in the noncommercial context, but evidences a willingness to consider making it a factor. *NOPR* at ¶¶9, 11(3).

⁴APTS/NPR assert that giving credit to state public broadcasting entities that have governing boards selected by the governor or other elected officials "provides greater assurance that non-commercial stations will receive financial support from the State, an increasingly important factor in view of congressional movement to reduce materially the level of federal financial support for public broadcasting." APTS/NPR Comments at 9-10. This ignores the fact that there are strong indications that funding for public broadcasting is being reduced or eliminated in many states. For example, North Carolina and California no longer fund public broadcasting, and Alaska and New York have greatly cut back on their funding.

B. Favoring Structure Over Programming

APTS/NPR ask the Commission to focus primarily on the structure of a noncommercial applicant, and thereby give diminished weight to an applicant's proposed programming. APTS/NPR Comments at 6. APTS/NPR claim that greater reliance on structural factors recognizes First Amendment concerns that arise from "government involvement in programming," and that such factors are "more likely to endure and to assure that the basis of the Commission's decision awarding the construction permit remains applicable." APTS/NPR Comments at 6.

NFCB does not believe that the Commission should place any greater or lesser reliance on any specific element in making a comparative determination. Instead, the Commission should treat all factors, including structure, programming and community involvement, on equal footing. This holistic approach will more likely result in selection of a licensee that will best serve community needs.

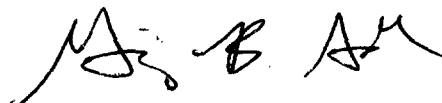
Nor does NFCB see any First Amendment concerns raised by the Commission's consideration of an applicant's programming. It is entirely appropriate for the Commission to evaluate an applicant's programming plans in evaluating whether an applicant will serve the "public interest, convenience and necessity." 47 USC §307(a), (d); *UCC v. FCC*, 707 F.2d 1416, 1428 (D.C. Cir. 1983) ("While nothing in the [Communications] Act expressly grants the Commission authority to regulate programming, the Commission is instructed to grant and renew broadcast licenses on the basis of the 'public interest, convenience and necessity.' This power to license in the public interest was held necessarily to entail the power to license on the basis of program ser-

vice.")⁵ Moreover, APTS/NPR provide no evidence that the structure of a licensee is any more or less likely to change than its programming. Indeed, it is not uncommon for structural factors, like the make-up of governing boards, to change on occasion.

CONCLUSION

The broad principles outlined by APTS/NPR are an excellent starting point for the Commission to base its decisions in granting noncommercial broadcast licenses. However, the Commission should decline APTS/NPR's invitation to place a premium on incumbent broadcasters as opposed to new entrants. Nor should the Commission favor structure over substance.

Respectfully submitted,



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⁵Indeed, at pp. 11-12 of its comments, APTS/NPR invite the Commission to make a detailed, content-based evaluation of a non-commercial applicant's programming, going so far as to argue that "[c]learly, creative news and public affairs programs, such as ALL THINGS CONSIDERED, MARKETPLACE, MORNING EDITION or FRONTLINE should be given substantially more credit than mere call-in programs." *Id.* at 12.